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Inside This Issue

Celebrating the FEHA's 50th Anniversary: A Review of the Most Significant Cases

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Note: *This article is the result of the authors' collaboration with the California Department of Fair Employment and Housing. However, the statements and opinions in this article are those of the authors, and not necessarily those of the Department of Fair Employment and Housing.*

This year marks the 50th anniversary of the California Fair Employment and Housing Act ("FEHA"),[1] and its predecessor, the Fair Employment Practices Act

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[1] Cal. Gov't Code §§ 12900–12996.

Celebrating the FEHA's 50th Anniversary: A Review of the Most Significant Cases

(Continued from page 1)

("FEPA"),[2] and we recognize the sea change it has brought to the lives of Californians, who presently work and conduct business under the most comprehensive anti-discrimination laws in the nation. This article is written as a tribute to the FEHA's 50th anniversary and is in collaboration with the California Department of Fair Employment and Housing ("DFEH") celebration of 2009 as the "Civil Rights Year."

FEPA, FEHA, and Finding the Way Forward

The first comprehensive federal anti-discrimination law was, of course, Title VII of the Civil Rights Act of 1964.[3] The path Congress followed in 1964, however, had been set out by the states, led by New York and California. It was New York that acted first, in 1945.[4] In that same year, California State Assemblymember Augustus F. Hawkins introduced similar legislation, which ultimately was passed in 1959 with the enactment of the FEPA.[5]

By today's standards, the Legislature's aim in 1959 was rather modest: to prohibit discrimination in compensation, terms, conditions and privileges of employment, and in hiring and firing, on the basis of race, creed, national origin or ancestry. The statutory remedies were limited to criminal penalties, injunctive relief and administrative orders for reinstatement.[6]

Since its enactment, California's primary employment discrimination law has grown in its scope, prohibitions and protections to outstrip its prior limitations and, in most instances, federal law and the laws of other states. In 1980, the FEPA was formally combined with the previously enacted Rumford Fair Housing Act of 1963,[7] and renamed the California Fair Employment and Housing Act.[8] Today, the FEHA's employment provisions prohibit discrimination and harassment in the workplace based on race, creed, color, national origin, ancestry, physical disability, mental disability, mental condition, marital status, sex, age or sexual orientation; protect employees from retaliation for invoking the protection of the FEHA; require employers to provide reasonable accommodation and engage in an interactive process to find reasonable accommodation for individuals with disabilities; provide liability for employers who fail to prevent unlawful discrimination and harassment; and prohibit employers from testing for genetic characteristics.[9] The FEHA also permits employees to take family care leave; provides anti-harassment and anti-discrimination protections for pregnancy, childbirth or related medical conditions; requires employers to make reasonable accommodations for pregnancy, childbirth or related medical conditions; requires employers to provide sexual harassment training to their supervisors; and prohibits the enforcement of certain workplace language policies.[10]

What we now understand to be the major features of California's anti-discrimination laws have developed and changed significantly through the years. Much of

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2 Former Cal. Labor Code § 1410 et seq., 1959 Cal. Stats. ch. 121 § 1, *repealed by* 1980 Cal. Stats. ch. 992 § 11.

3 *See* 42 U.S.C. § 2000e et seq.

4 *See* Thomas E. Kellett, *The Expansion of Equality*, 37 S. Cal. L. Rev. 400, 409 (1963–1964) (citing Laws of New York, ch. 118, § 1).

5 *See* 1959 Cal. Stats., ch. 121. According to the papers of Augustus F. Hawkins, stored in the Department of Special Collections at the University of California at Los Angeles ("UCLA") Library, then-Assemblymember Hawkins introduced fair employment practices legislation in 1945 and then worked over the next fourteen years until FEPA's enactment in 1959. For example, see http://content.cdlib.org/xtf/view?docId=hb7k40090x&query=&brand=calisphere.

6 *See* 1959 Cal. Stats. ch. 121.

7 Former Health & Saf. Code § 35700 et seq., 1963 Cal. Stats. ch. 1853 § 2, *amended by* 1968 Cal. Stats. ch. 944, 1974 Cal. Stats ch. 1224, 1975 Cal. Stats. chs. 280, 1189, 1977 Cal. Stats. chs. 1187, 1188, 1978 Cal. Stats. ch. 380, *repealed by* 1980 Cal. Stats. ch. 992 § 8.

8 *See* 1980 Cal. Stats. ch. 992 § 4; Rojo v. Kliger, 52 Cal. 3d 65, 72 (1990) (discussing history of FEHA and FEPA).

9 *See* Cal. Gov't Code § 12940.

10 *See* Cal. Gov't Code § 12940, § 12945 et seq., § 12950 et seq. and § 12951.

this expansion has been at the hands of the Legislature, but the courts, too, have been instrumental in shaping the law. Courts have defined, refined and explained what the FEHA means, and one cannot reflect on the last 50 years of anti-discrimination efforts without appreciating the role courts have played in making the FEHA what it is today. Identifying the most significant FEHA cases and trends is a difficult, and surely subjective, task. Here is our "top ten" list, in no particular order.

Number 10: The Arbitrability of FEHA Claims

For many years employers and employees alike assumed, not without question, that discrimination claims could properly fall within the scope of a predispute arbitration provision. In 2000, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, the California Supreme Court held that FEHA claims are arbitrable "if the arbitration permits an employee to vindicate his or her statutory rights."[11] Although the court struck down as unconscionable the particular agreement at issue, it made clear that arbitration of employment-related claims under California law, including claims under the FEHA, can be compelled if the predispute arbitration agreement (1) provides for a neutral arbitrator;[12] (2) provides for adequate discovery;[13] (3) requires a written award;[14] (4) provides for all of the types of relief that would otherwise be available in court;[15] (5) does not require employees to pay unreasonable costs, fees or expenses as a condition of access to the arbitration;[16] and (6) contains a "modicum of bilaterality," requiring both the employee and employer to arbitrate claims arising out of the same transactions or occurrences.[17]

Number 9: Defining the Administrative Remedy

Approximately twenty years ago, the California Supreme Court in *Rojo v. Kliger*[18] and *Dyna-Med, Inc. v. Fair Employment and Housing Commission*[19] delineated the FEHA's administrative remedy. The court limited administrative exhaustion requirements, as well as the categories of damages awardable by the Fair Employment and Housing Commission ("FEHC"), and thereby cleared the way for FEHA plaintiffs inclined to pursue their claims in court.

In *Rojo*, the court concluded that the FEHA was not an exclusive remedy; rather, the Legislature in enacting the FEHA "manifested an intent to amplify, not abrogate, an employee's common law remedies for injuries relating to employment discrimination."[20] The court, accordingly, found that the FEHA did not limit other common law and statutory claims,[21] and that administrative exhaustion was not required before filing a civil action for damages alleging a nonstatutory cause of action.[22] While the *Rojo* opinion noted that administrative exhaustion was a precondition to bringing a civil suit under the FEHA, the court in prior cases had recognized that a FEHA complainant who wanted to withdraw his administrative complaint and proceed directly to court could request a right-to-sue letter and, as a practical matter, receive one even before the expiration of the statutorily-prescribed 150-day accusation period.[23]

In *Dyna-Med*, the court held that the FEHC was not authorized to award punitive damages, reasoning that "[t]he Commission . . . has broad authority to fashion an appropriate remedy without resort to punitive damages."[24] The court also found that allowing the FEHC to award punitive damages would disserve the efficiency of the administrative process.[25] Three years later in *Peralta Community College District v. Fair Employment and Housing Commission*,[26] the court

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11 24 Cal. 4th 83, 90 (2000) (emphasis omitted).

12 *Id.* at 103 ("[T]he neutral arbitrator requirement . . . is essential to ensuring the integrity of the arbitration process.").

13 *Id.* at 104 ("[A]dequate discovery is indispensable for the vindication of FEHA claims.").

14 *Id.* at 107 ("[I]n order for such judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based.").

15 *Id.* at 103 ("[A]n arbitration agreement may not limit statutorily imposed remedies.").

16 *Id.* at 110–11 ("[T]he arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court.").

17 *Id.* at 117, 120.

18 52 Cal. 3d 65 (1990).

19 43 Cal. 3d 1379 (1987).

20 52 Cal. 3d at 75.

21 *Id.*

22 *Id.* at 88.

23 Commodore Home Systems, Inc. v. Superior Court, 52 Cal. 3d 211, 218 n.8 (1982); State Personnel Board v. Fair Employment and Housing Comm'n, 39 Cal. 3d 422, 433 n.11 (1985).

24 43 Cal. 3d at 1393 (internal citation omitted).

25 *Id.*

26 52 Cal. 3d 40 (1990).

used similar reasoning to conclude that the FEHC was not authorized to award general compensatory damages.[27] Coupled with the court's decision in *Commodore Home Systems, Inc. v. Superior Court*[28] that private litigants could recover punitive damages in FEHA civil actions, *Dyna-Med* and *Peralta* arguably encouraged aggrieved persons to pursue private actions, in which they could assert both FEHA and common law claims with the possibility of recovering punitive damages.

Number 8: Preserving the Summary Adjudication of FEHA Claims

In October 2000, in *Guz v. Bechtel National, Inc.,*[29] the California Supreme Court reversed the court of appeal and affirmed the trial court's grant of summary judgment in favor of the defendant employer on the plaintiff's FEHA age discrimination claim, among others.[30] FEHA plaintiffs frequently argued that because liability turns on the decisionmaker's intent, summary judgment in discrimination cases was inappropriate (i.e., that discrimination claims necessarily presented triable issues). The *Guz* Court clarified this issue through its holding that discrimination claims can be resolved as a matter of law and confirmed that "summary judgment for the employer may [] be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred."[31]

Number 7: Expanding the FEHA's Disability Protections

Disability discrimination has been an area of marked difference between California and federal anti-discrimination law. Even with the recent amendments to the federal Americans with Disabilities Act ("ADA"), the FEHA's disability protections remain broader than those found anywhere else. While the California Legislature, through AB 2222,[32] was primarily responsible for expanding the FEHA's disability protections, no list of the most significant FEHA trends and cases would be complete without recognizing the breadth of the FEHA in this area and recounting the back-and-forth between the California Legislature and the California Supreme Court over the issue of whether a disability must "substantially limit," or merely "limit," a major life activity in order to qualify an individual for protection under the FEHA.

Before AB 2222, the California Supreme Court in *Cassista v. Community Foods*[33] held that the plaintiff (who stood five feet, four inches tall and weighed 305 pounds at the time she applied for a job with the defendant employer) was not disabled under the FEHA because her weight did not "substantially limit" her in any major life activity.[34] The court found that the FEHA's disability provisions tracked those of the ADA and, thus, it was appropriate to consider federal interpretations of the ADA when interpreting the FEHA's provisions.[35]

On January 1, 2001, the California Legislature expressly rejected *Cassista's* suggestion that federal interpretations of the ADA should guide construction of the FEHA: "The law of this state in the area of disabilities provides protections independent from those in the [ADA]. Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections."[36] Thus, the Legislature made clear that the FEHA was intended to do more than simply mirror the protections provided by the ADA.

The Legislature, accordingly, disregarded the holding in *Cassista* and clarified that the FEHA requires only that a disability "limit" a major life activity, not (as the ADA requires) that it impose a "substantial limitation."[37] "This distinction is intended to result in broader coverage under the law of this state than under the federal act."[38] Later, in *Colmenares v. Braemar*

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27 *Id.* at 55–56 ("[T]he purpose of the FEHA to provide an efficient and expeditious avenue for elimination of discriminatory practices would be compromised as agency proceedings would come increasingly to resemble traditional lawsuits. . . .").

28 52 Cal. 3d 211 (1982).

29 24 Cal. 4th 317 (2000).

30 *Id.* at 327.

31 *Id.* at 362.

32 2000 Cal. Stats. ch. 1049 (amending sections 51, 51.5, and 54 of the California Civil Code, and sections 12926, 12940, 12955.3, and 19231 of, and adding section 12926.1 to, the California Government Code).

33 5 Cal. 4th 1050 (1993).

34 *Id.* at 1060.

35 *Id.*

36 Cal. Gov. Code § 12926.1(a).

37 *Id.* § 12926.1(c).

38 *Id.*

Country Club, Inc.,[39] the California Supreme Court reconciled AB 2222 with its earlier ruling, explaining that the reference in *Cassista* to "substantial limitation" was mere dicta, and that the FEHA always has afforded greater protections to disability plaintiffs than the ADA. Thus, held the court, the Legislature in AB 2222 "intended not to make a retroactive change, but only to clarify the degree of limitation required to be physically disabled."[40]

Number 6: Clarifying the Disability Plaintiff's Proof Burden

Another important debate has been whether, and to what extent, the FEHA shares the ADA's requirement that a disability plaintiff must prove that he or she is a qualified individual. Two landmark cases shaped the law in this area: *Jensen v. Wells Fargo Bank, N.A.*[41] and, more recently, *Green v. State of California*.[42]

In *Jensen*, a California Court of Appeal held in the accommodation context that a FEHA disability plaintiff bears the burden of showing, as part of her *prima facie* case, that she is a qualified individual under the statute. In that case, the plaintiff, a bank branch manager who developed post-traumatic stress disorder after surviving a robbery at the bank branch, was medically restricted from working at the branch and unsuccessfully sought a non-branch position as an accommodation.[43] In evaluating the plaintiff's failure-to accommodate claim, the court held that the plaintiff in the first instance "must . . . establish that he or she suffers from a disability covered by FEHA and that he or she is a qualified individual."[44]

Jensen was recognized for many years as the prevailing rule, though not without debate. For example, in *Bagatti v. Department of Rehabilitation,*[45] the Third Appellate District criticized *Jensen* for failing to distinguish the statutory language of the FEHA from the ADA, which expressly includes the "qualified individual" requirement.[46]

In 2007, the California Supreme Court made clear that a plaintiff who cannot perform a job's essential functions because of a disability, even after reasonable accommodation, is not qualified and, therefore, has no discrimination claim, and that the plaintiff properly bears the burden of demonstrating that he or she is qualified.[47] The court reached its conclusion by referring to the ADA and its allocation of the burden of proof, noting the "striking[]" similarities between the language of the FEHA and the ADA with respect to this requirement.[48] The court further observed from the legislative history that the "[California] Legislature incorporated the ADA requirement with full knowledge of the purpose the language serves in the ADA."[49] The *Green* Court reconciled its reference to the ADA with AB 2222 and *Colmenares* by explaining that "the fact that the Legislature intended to provide plaintiffs with broader substantive protection under the FEHA . . . does not affect the Legislature's contemplation that a plaintiff must prove that he or she can perform the essential functions of the job. . . ."[50]

Number 5: Broadly Defining Retaliatory Adverse Employment Actions

In *Yanowitz v. L'Oreal USA Inc.*,[51] the California Supreme Court set the standard for what constitutes a retaliatory adverse employment action under the FEHA.[52] The court in *Yanowitz* adopted a "materiality"

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39 29 Cal. 4th 1019 (2003).

40 *Id.* at 1028.

41 85 Cal. App. 4th 245 (2000). To view Court of Appeal briefs available on Lexis.com, go to 1999 CA App. Ct. Briefs 34875.

42 42 Cal. 4th 254 (2007).

43 85 Cal. App. 4th at 250.

44 *Id.* at 256.

45 97 Cal. App. 4th 344 (2002). To view Court of Appeal briefs available on Lexis.com, go to 2002 CA App. Ct. Briefs 37965C.

46 *Id.* at 361 n.4 ("We respectfully disagree with *Jensen* to the extent it holds that, in order to assert a claim for failure to accommodate, a plaintiff must show that he or she is 'a qualified individual' within the meaning of [the ADA]. Jensen cites no apposite authority for that assertion, which, as we have explained, finds no reference in the FEHA statute or applicable regulation. The two federal cases cited by *Jensen* do not mention the FEHA but are rather interpretations of the ADA where, as we have seen, 'a qualified individual with a disability' is given express statutory definition.").

47 *Green*, 42 Cal. 4th at 262 ("[I]n order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation.").

48 *Id.*

49 *Id.* at 263.

50 *Id.* at 265.

51 36 Cal. 4th 1028 (2005).

52 *Id.* at 1036.

test, i.e., "an employer's adverse action [must] materially affect the terms and conditions of employment."[53]

The standard protects employees not only with respect to " 'ultimate employment actions' such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career."[54] However, actions that are "[m]inor or relatively trivial adverse actions," or "from an objective perspective, are reasonably likely to do no more than anger or upset an employee" do not rise to the level of an actionable adverse employment action.[55]

In *Yanowitz*, the sales manager plaintiff claimed that a higher-ranking male executive instructed her to fire a sales associate because "he did not find the woman to be sufficiently physically attractive," telling the plaintiff to "[g]et me somebody hot."[56] The plaintiff refused and asked for justification for the instruction.[57] Thereafter, according to the plaintiff, her immediate supervisor (who reported to the executive) attempted to sabotage her career by soliciting negative feedback about her performance, criticizing her in front of her subordinates, and giving her negative performance evaluations.[58] The court found that the plaintiff alleged a retaliatory course of conduct and that each separate alleged retaliatory act need not rise to the level of an "adverse employment action" in itself, but may be considered together as a whole.[59] The court concluded that the plaintiff satisfied the materiality test because the alleged acts "placed her career in jeopardy," are "objectively adverse," and "constituted more than mere inconveniences or insignificant changes in job responsibilities."[60]

In adopting the materiality test, the *Yanowitz* Court rejected the broader standard of "deterrence" for retaliation claims, as opposed to discrimination claims. The proposed "deterrence" standard defined an adverse employment action to be "any action that is reasonably likely to deter employees from engaging in protected activities."[61] Instead, the court focused its analysis on the statutory language and reasoned that the California Legislature intended the standard to be the same for both retaliation and discrimination claims.[62]

The year following *Yanowitz*, the United States Supreme Court, in *Burlington Northern and Santa Fe Ry. Co. v. White*,[63] examined the issue of what constitutes an adverse employment action under Title VII. Analyzing language very similar to the FEHA, the Court adopted the "deterrence standard" that *Yanowitz* had rejected, reasoning that the anti-retaliation provision under Title VII was intended to reach a broader range of conduct than the anti-discrimination provisions.[64] Courts continue to interpret both *Yanowitz* and *Burlington Northern*.

Number 4: Harassment Versus Retaliation and Discrimination, and the Impact on Individual Liability

In *Reno v. Baird*,[65] the California Supreme Court differentiated between harassment and discrimination and held that individual supervisors may be liable for the former, but not the latter. The court reasoned that *harassment* (which is outside "the scope of necessary job performance [and] presumably engaged in for personal gratification"), is fundamentally different from *discrimination* (which involves personnel management actions—like hiring, firing, promotions, job assignments, etc.—that are necessary to running a business).[66] Whereas a supervisor can refrain from engaging in harassing behavior, it is impossible to refrain from making personnel management decisions.[67]

The *Reno* Court also relied on the statutory text for its holding. Whereas the FEHA's harassment prohibition specifically makes it illegal for "any other person," in addition to the employer, to engage in harassment, the anti-discrimination provision prohibits only "an employer" from engaging in discrimination.[68]

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53 *Id.* at 1051.

54 *Id.* at 1054.

55 *Id.*

56 *Id.* at 1038.

57 *Id.*

58 *Id.* at 1039.

59 *Id.* at 1055–1056 ("there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.").

60 *Id.* at 1060.

61 *Id.* at 1050.

62 *Id.* at 1050–52.

63 548 U.S. 53 (2006).

64 *Id.* at 68.

65 18 Cal. 4th 640 (1998).

66 *Id.* at 645–46.

67 *Id.*

68 *Compare* Cal. Gov't Code § 12940(j) *with* Cal. Gov't Code § 12926.

Building on its holding in *Reno*, the California Supreme Court last year in *Jones v. The Lodge at Torrey Pines Partnership*[69] held that individual, non-employer supervisors cannot be held personally liable for retaliation under the FEHA. Although the FEHA's retaliation provision makes it an unlawful employment practice for "any ... person" to retaliate against an employee who has made a complaint,[70] the court held that the relevant subsection encompasses only employers. The court expressly left open the possibility, however, that "an individual who is personally liable for harassment might also be personally liable for retaliating against someone who opposes or reports that same harassment."[71]

Number 3: Limiting Employer Exposure for Supervisory Harassment

In *State Department of Health Services v. Superior Court*,[72] the California Supreme Court confirmed that employers are strictly liable under the FEHA for sexual harassment by their supervisory employees. However, under the doctrine of avoidable consequences, a plaintiff cannot recover damages that could have been "avoided with reasonable effort and without undue risk, expense, or humiliation."[73]

The court determined that the employer was strictly liable for the actions of the supervisor, reasoning that "[b]ecause the FEHA imposes [a] negligence standard only for harassment 'by an employee other than an agent or supervisor' (§ 12940, subd. (j)(1)), by implication the FEHA makes the employer strictly liable for harassment by a supervisor."[74] "But strict liability is not absolute liability in the sense that it precludes all defenses."[75] Rather, under the FEHA, as "[i]n civil actions generally, the right to recover damages is qualified by the common law doctrine of avoidable consequences."[76] The court explained that this defense has the following elements: "(1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered."[77]

The court explained that one of the FEHA's goals is to encourage employers to establish "effective measures to prevent workplace harassment," including "establish[ing] ... antiharassment policies and ... set[ting] up and implement[ing] effective grievance procedures."[78] The court reasoned, "[a]lthough full compensation of workplace harassment victims is an important FEHA goal, *preventing* workplace harassment is a FEHA goal of equal and perhaps even greater importance."[79] "By encouraging prompt resort to employer-provided remedies, application of the avoidable consequences doctrine can stop workplace harassment before it becomes severe or pervasive."[80]

One issue ostensibly before the *State Department of Health Services* Court was whether the rule set forth by the United States Supreme Court in *Burlington Indus., Inc. v. Ellerth*[81] and *Faragher v. City of Boca Raton*[82] for sexual harassment claims under Title VII—which provided an employer with a partial or complete defense to liability by showing that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior and that the employee unreasonably failed to take advantage of preventive or corrective opportunities—applied to claims under the FEHA. The court effectively held "no," making clear that the defense it articulated "affects damages, not liability."[83] The court did, however, state that "to the extent the United States Supreme Court grounded the *Ellerth/Faragher* defense in the doctrine of avoidable consequences, its reasoning applies also to California's FEHA."[84]

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69 42 Cal. 4th 1158 (2008). To view California Supreme Court briefs available on Lexis.com, go to 2007 CA S. Ct. Briefs 51022A.

70 Cal. Gov't Code § 12940(h).

71 42 Cal. 4th at 1168 n.4.

72 31 Cal. 4th 1026 (2003). To view California Supreme Court briefs available on Lexis.com, go to 2002 CA S. Ct. Briefs 103487.

73 *Id.* at 1034.

74 *Id.* at 1041.

75 *Id.* at 1042.

76 *Id.*

77 *Id.* at 1044.

78 *Id.* at 1047.

79 *Id.*

80 *Id.*

81 524 U.S. 742 (1998).

82 524 U.S. 775 (1998).

83 31 Cal. 4th at 1045.

84 *Id.* at 1044.

Number 2: Not-So-Friendly Work Environments (i.e., You Won't Make Any "Friends" Here)

In *Lyle v. Warner Brothers Television Productions*,[85] the California Supreme Court concluded that adult comedy writers' use of sexually explicit language and gesturing in the presence of their female writer's assistant did not constitute harassment within the meaning of the FEHA. The plaintiff in *Lyle* was a comedy writer's assistant for the popular adult-oriented television show, "Friends."[86]

The plaintiff, Amaani Lyle, was forewarned during her job interview that the show dealt with sexual matters, that she would be listening to sexual jokes and discussions, and that it would be her job to transcribe much of this material for use in future scripts.[87] At that time, she indicated that such jokes and discussions did not bother her, and she was hired.[88] After approximately four months of work, she was terminated for problems with her typing and transcriptions.[89] She filed suit claiming, *inter alia*, that the writers' use of coarse and vulgar language and conduct constituted harassment under the FEHA.[90] Plaintiff's complaint and subsequent filings described a work environment that she considered far more sexualized, vulgar and degrading than she had been led to believe it would be.[91] For instance, beyond detailed discussions of the writers' own sexual experiences and sexual desires, one of the writers apparently maintained a book with graphic sexual images.[92] According to the plaintiff, sex-based discussions and gestures also occurred in the breakroom and hallways.[93]

In evaluating the plaintiff's harassment claim, the court looked at the totality of the circumstances and asked whether a reasonable trier of fact could conclude that such language constituted harassment directed at plaintiff *because of her sex*.[94] The court noted the unique circumstance of the workplace as "focused on generating scripts for an adult-oriented comedy show featuring sexual themes," explaining that this was significant to the determination of whether there were triable issues of fact "regarding whether the writers' sexual antics and coarse sexual talk were aimed at plaintiff or at women in general, whether plaintiff and other women were singled out to see and hear what happened, and whether the conduct was otherwise motivated by plaintiff's gender."[95] Considering these circumstances, and in light of the fact that males and females alike participated in the sexual discussions and the fact that the sexual discussions were not aimed at plaintiff or any other female employee, the court concluded that no reasonable trier of fact could find that such language constituted harassment directed at plaintiff "because of . . . sex" within the meaning of FEHA.[96]

If the court in *State Department of Health Services* was reluctant to find consistencies between state and federal harassment law, the *Lyle* Court was not. It relied heavily on Title VII harassment cases and emphasized the similarities between federal and state law in the area of harassment.[97]

Number 1: Relaxing the Statute of Limitations

The FEHA generally requires that a complaint be filed within a year "from the date upon which the alleged unlawful practice . . . occurred."[98] In a series of cases over the last decade, the California Supreme Court has liberalized this statute of limitations, resulting in a lowered bar for employees to bring claims under the Act, more employee control over the timing of their litigation, and less certainty for employers about when FEHA claims are timed-out.

The first key case was *Romano v. Rockwell International, Inc.*,[99] which held that a termination "occurs" on the date of actual termination of employment, not on the date the employee receives notice that his employment will be terminated.[100] In *Romano*, the plaintiff first was told of his termination approximately two and a half years before his employment actually terminated.[101] By holding that the limitations period

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85 38 Cal. 4th 264 (2006). To view California Supreme Court briefs available on Lexis.com, go to 2006 CA S. Ct. Briefs 125171.

86 *Id.* at 271.

87 *Id.*

88 *Id.* at 275.

89 *Id.* at 272.

90 *Id.*

91 *Id.* at 275–76, 287.

92 *Id.* at 275.

93 *Id.*

94 *Id.* at 286–87, 292.

95 *Id.* at 287.

96 *Id.* at 286, 292.

97 *Id.* at 278–79.

98 Cal. Gov't Code § 12960(d).

99 14 Cal. 4th 479 (1996).

100 *Id.* at 479.

101 *Id.* at 484–85.

ran from the date of actual termination, in *Romano* the court affirmed the appellate court's reversal of the trial court's dismissal of the plaintiff's claims as time-barred.

This decision was distinctive for, among other reasons, the fact that it rejected a contrary rule under Title VII articulated by the United States Supreme Court.[102] The *Romano* Court acknowledged this rejection, emphasizing the different statutory language of the FEHA and questioning the soundness of the Supreme Court's reasoning.[103] The *Romano* Court offered several policy justifications for its decision. Its primary rationale was that a "notification rule" would encourage premature litigation and discourage informal conciliation between employees and employers. Such a rule would, in the court's opinion, be contrary to the purposes of the FEHA.[104] The court further noted that the "date-of-termination rule" would result in no undue burden to employers because the time period between notification and termination is usually short, the employer usually controls both dates and should have sufficient opportunity to preserve evidence, and the "date-of-termination rule" provides simplicity by the fact that the termination date is usually undisputed.[105]

The following year, the California Supreme Court in *Mullins v. Rockwell International, Inc.*[106] extended the rule set forth in *Romano* to "constructive discharge" cases, holding that the limitations period begins to run on the date of the involuntary resignation, not on the date that conditions allegedly became intolerable to a reasonable employee.[107] As in *Romano*, the court stressed that "a rule requiring a lawsuit to be filed as soon as intolerable conditions begin would interfere with informal conciliation in the workplace," leading to premature claims.[108]

Further extending the relaxed standards set forth in *Romano* and *Mullins*, the California Supreme Court in *Richards v. CH2M Hill, Inc.*[109] held that the continuing violation exception to the statute of limitations applies to claims for failure to accommodate a disability and disability harassment under the FEHA.[110] The *Richards* Court applied the same policy rationale set forth in *Romano* and *Mullins* against encouraging "premature litigation at the expense of informal conciliation" in reasoning that a disabled employee need not file a lawsuit at the first sign of failure to accommodate, but only after a degree of "permanence."[111] In the disability accommodation context, only "when an employer makes clear it will not further accommodate an employee," does "justification for delay in taking formal legal action no longer exist[]."[112]

Finally, just this last year, the California Supreme Court in *McDonald v. Antelope Valley Community College District*[113] held that "equitable tolling" may apply to extend the FEHA statute of limitations during an employee's voluntary pursuit of a claim through an employer's internal administrative grievance proceedings.[114] The court reasoned that equitable tolling is available under the FEHA, because the statute does not include an express prohibition and nothing in the statutory text suggests an implicit legislative intent to preclude equitable tolling, and because no policy underlying the FEHA would foreclose equitable tolling in all circumstances.[115] In fact, the court (citing *Richards* and *Romano*) held that the policies underlying the FEHA "evince a legislative intent that it and its statute of limitations must be liberally interpreted in favor of both allowing attempts at reconciliation and ultimately resolving claims on the merits."[116]

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102 *See* Delaware State College v. Ricks, 449 U.S. 250 (1980); Chardon v. Fernandez, 454 U.S. 6 (1981).

103 14 Cal. 4th at 498.

104 *Id.* at 494.

105 *Id.*

106 15 Cal. 4th 731 (1997) (a non-FEHA breach of contract case with reasoning applicable to FEHA cases and which has been cited by subsequent FEHA cases).

107 *Id*.

108 *Id.* at 741.

109 26 Cal. 4th 798 (2001).

110 The court set forth a three-part test for when "an employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation." *Id.* at 823. The alleged unlawful conduct (1) must be similar in kind; (2) must have occurred with reasonable frequency; and (3) must have not acquired a degree of "permanence," which the court defined as a situation where "an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." *Id.*

111 *Id.* at 821.

112 *Id.* at 823.

113 45 Cal. 4th 88 (2008).

114 *Id.* at 106.

115 *Id*. at 106–108.

116 *Id*. at 107–108.

Honorable Mentions

Weeks v. Baker & McKenzie

This well-publicized case surely put California harassment law on the map. A jury found that former Baker & McKenzie law firm partner, Martin R. Greenstein, had a history of sexually harassing female attorneys and support staff and unlawfully harassed legal secretary Rena Weeks.[117] The jury awarded compensatory damages and punitive damages against both Greenstein and the law firm, as well as substantial attorneys' fees. The $3.5 million punitive damages award remains the largest published single-plaintiff FEHA harassment verdict to have survived judicial review.

Constructive Discharge

Although not primarily a FEHA case, *Turner v. Anheuser-Busch, Inc.*[118] set a high bar for constructive discharge claims. The California Supreme Court held that an employee must establish "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign."[119]

New Trials

In *Lane v. Hughes Aircraft Co.*,[120] the California Supreme Court held that an order granting a new trial under California law must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on the trial court's theory.[121] The *Lane* Court found that the appellate court erred in applying "the same standard when reviewing the new trial order as when reviewing the judgment notwithstanding the verdict."[122] Rather, a highly deferential standard should have been applied to reviewing an order granting a new trial.[123] The court emphasized that "so long as the outcome [of the trial] is uncertain at the close of trial—that is, so long as the evidence can support a verdict in favor of either party—a properly constructed new trial order is not subject to reversal on appeal."[124]

Workplace Injuries and Workers' Compensation Exclusivity

A number of cases have explored whether discrimination claims are preempted by workers' compensation exclusivity, and answered the question in the negative.[125] These cases underscore that California's anti-discrimination laws are intended to amplify and expand on existing rights and remedies.

Paramour Favoritism

In *Miller v. Department of Corrections*,[126] the California Supreme Court held that "an employee may establish sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment."[127] Plaintiffs, two former state prison employees, claimed that a warden at the prison where they were employed created a hostile work environment by treating various female employees with whom he was sexually involved much more favorably than those employees with whom he was not sexually involved.

Conclusion

The FEHA's next 50 years surely will bring additional and exciting changes. At this anniversary mark, we celebrate FEHA's 50th and take a moment to look back at the pivotal turns that have shaped the FEHA's development so far.

The authors are attorneys from each California office of Paul, Hastings, Janofsky & Walker LLP, where they exclusively represent employers in state and federal employment litigation and advice matters. The authors wish to express their gratitude for their colleagues across California who contributed to the preparation of this article.

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117 63 Cal. App. 4th 1128, 1138, 1143 (1998).

118 7 Cal. 4th 1238 (1994).

119 *Id.* at 1251.

120 22 Cal. 4th 405 (2000).

121 *Id.* at 409.

122 *Id.*

123 *Id.*

124 *Id.* at 414.

125 *See*, *e.g.*, City of Moorpark v. Superior Court, 18 Cal. 4th 1143, 1150–58 (1998); Shoemaker v. Myers, 52 Cal. 3d 1, 22 (1990).

126 36 Cal. 4th 446 (2005). To view California Supreme Court briefs available on Lexis.com, go to 2003 CA S. Ct. Briefs 114097.

127 *Id.* at 466.